

Before the
FEDERAL COMMUNICATIONS COMMISSION
 Washington, D.C. 20554

In the Matter of

Amendment of Section 73.202(b))
 Table of Allotments)
 FM Broadcast Stations)
 (Corona de Tucson, Sierra Vista,)
 Tanque Verde and Vail, Arizona; Animas,)
 Lordsburg and Virden, New Mexico))

MB Docket No. 05-245

FILED/ACCEPTED

MAY 21 2008

Federal Communications Commission
 Office of the Secretary

To: Office of the Secretary
 (Attention: The Commission)

REPLY TO OPPOSITION TO APPLICATION FOR REVIEW

CCR-Sierra Vista IV, LLC ("CCR"), by its attorneys, hereby submits this Reply to the Opposition to Application for Review ("Opposition") submitted on May 6, 2008 by Cochise Broadcasting, LLC and Desert West Air Ranchers Corporation (collectively, "Cochise") in the above-captioned proceeding.

Cochise's Opposition fails to rebut the arguments in CCR's Application for Review. CCR's Application for Review raises questions of law and policy which have not previously been resolved by the Commission and application of a policy which should be overturned or revised. The Opposition simply repeats Cochise's faulty arguments in support of a complex counterproposal which is supported by faulty pillars. Although Cochise's counterproposal contains several defects, the Commission need only strike down one part of Cochise's multiple-step allotment proposal to find that CCR's proposal better serves the FM allotment priorities and that the Bureau's MO&O should be reversed.

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I. The Commission Has Not Previously Considered How the Commission's Rules Define Terrain that "Departs Widely" to Allow for a Supplemental Showing.

Instead of responding to CCR's showing that the Commission has not previously considered how Section 73.313(e) of the Commission's rules defines terrain that "departs widely," Cochise quotes a sentence out of context from a 1997 *Report and Order*, 12 FCC Rcd 12371, 12403, from which Cochise takes a leap of logic. Cochise asserts that CCR's showing that the Commission has not previously provided guidance on the definition of "departs widely" is "irrelevant" because "it is the applicant's and not an opponent's option to provide a supplemental showing."¹ The cited *Report and Order* says nothing to that effect. Although the Commission stated there that "an applicant is not required to provide a supplemental analysis," it does not say that the Commission will *not* consider a supplemental showing submitted by an objecting party that puts into question whether an applicant's proposal provides the required principal community coverage.

The Engineering Statement attached to Cochise's Opposition attempts to provide a legal analysis of a Media Bureau decision in *Hemet, California*. CCR provided *Hemet* as an example of a Bureau decision in which actual terrain data was permitted to be used. CCR then demonstrated that despite a number of actions the Commission has taken to continue to expand the areas where the Longley-Rice method may be used, the Commission has yet to provide a single, unified alternative prediction methodology. Cochise's Opposition fails to respond to this point. Cochise also fails to address CCR's related point that the Bureau based its MO&O on a mistake of fact and an interpretation of the Commission's rules that has not previously been considered by the Commission.²

¹ Opposition to Application for Review at p.3, fn 8.

² Cochise also seems to rely on an unpublished letter ruling to state that the Commission can dismiss CCR's claim without further consideration. *Id.* at p.4, fn 9 (citing *Letter to Mark N. Lipp, re: KMAJ-FM, Topeka, Kansas (BPH-20000316ACF)*, DOC-225693A1 (Aug. 8, 2002)). However, an unpublished ruling has no precedential value.

II. The Opposition Fails to Respond to CCR's Consultants' Opinions that the Cochise Allotment Coordinates Are Not Viable.

Cochise's Opposition conveniently fails to address a clear statement from Mary C. Lowe of John P. Allen Airspace Consultants: "With a proposed height of 3,348 feet AMSL, the minimum vectoring altitude will have to be increased from 4,000 feet AMSL to 4,300 feet AMSL. For this to happen Tucson Radar Approach Control will have to agree with the requisite change." CCR's engineering consultant advised that rarely, if ever, are airports willing to increase risk to the aeronautical community by raising approach minimums. The exact phrase "the proposed tower is a presumed FAA hazard" is not in the airspace consultant's letter; but it is clear that requiring the Tucson airport to raise its approach minimums is not a part of a routine FAA notice and marking process. It is Cochise's responsibility to demonstrate that there is no impact to the Tucson Radar Approach Control associated with the proposed structure. To date, it appears that Cochise has not even filed FAA Form 7460-1, Notice of Proposed Construction or Alteration. Under the present circumstances, that should be required.

Cochise continues to ignore CCR's consultants' opinions that the proposed coordinates in the counterproposal are not viable. Clearly, since the proposed Cochise allotment coordinates and tower height for CH267C3 at Tanque Verde are mutually exclusive with the existing Radar Approach to the Tucson Airport, the counterproposal can not be effectuated.

III. The Opposition Fails to Rebut CCR's Showing Regarding Animas, NM.

Cochise's Opposition continues to argue that Animas, New Mexico is a community for allotment purposes. While Cochise seeks to support its assertions by using a letter from the Hidalgo County Manager's Office, print-outs of websites from Hidalgo county and photographs that are not identified by location, date or photographer, CCR has shown that Animas is unincorporated, is not

listed in the U.S. Census, has no local government, and has no civic organization that identifies itself as a member of a geographically identifiable community. Most importantly, there is no showing whatsoever that any of the residents who use the services of businesses, organizations, churches or schools Cochise identified perceive themselves as “a geographically identifiable population grouping.”³ Ninety-eight percent of the students in the Animas school district are bused into the Animas schools, which are known for some of the longest bus rides in the state of New Mexico; and the Animas Post Office serves residents in surrounding ranches as far as 50 miles away. Cochise’s Opposition does not refute that while Animas is a sparsely-populated geographical space within Hidalgo county, it is not a community with its own separate identity sufficient to warrant the allocation of a separate local transmission service.

IV. Cochise’s Opposition Fails to Show that Station KKYZ was Allocated to Corona de Tucson at the Time of the Filing of its Counterproposal and Fails to Respond to the Fact that the Station Still Does Not Operate at Tanque Verde.

CCR showed that when Cochise filed its counterproposal, KKYZ was operating on Channel 269A at Sierra Vista and Cochise’s proposal to change KKYZ’s allocation from Sierra Vista to Corona de Tucson was pending. Not only does Cochise’s Opposition fail to respond to this point, it also never addresses CCR’s point that the Commission should not allow licensees to bootstrap using phantom facilities to obtain mutual exclusivity.⁴ Because Cochise’s counterproposal was not mutually exclusive with CCR’s proposal at the time of filing, the Commission should reverse the Bureau’s decision and grant CCR’s proposal.⁵

³ *Revision of FM Assignment Policies and Procedures*, 90 FCC 2d 88, 101 (1982).

⁴ Cochise’s reliance on the *Dubach* decision is misplaced. In *Dubach*, the proposed multiple-step allotment did not hinge on an illusory construction permit that was not granted at the time the proposal was submitted.

⁵ Cochise attempts to dismiss CCR’s showing that an unbuilt station is not an existing service for allotment purposes, but provides no Commission precedent for such a statement.

V. The Opposition Fails to Show that Cochise Will Receive Mexican Concurrence.

One of the necessary links for Cochise's chain of allotments is that its proposal to allot Channel 279A at Vail, Arizona receive concurrence from Mexico. Cochise concedes that the Commission's approval was made contingent on the eventual receipt of Mexican concurrence, which has not yet occurred. The fact that Mexico still objects to this allotment, despite a request to reconsider submitted by the International Bureau in February of 2007, should be a telling sign that this allotment may never receive Mexican concurrence. In fact, Article 8.1.7 of the "Bilateral Agreement Between the Government of the United States and the Government of the United Mexican States Relating to the FM Broadcasting services in the Band 88-108 MHz" specifically states: "An allotment should be included in the Plan and notification procedures shall be completed prior to placing a proposed assignment into operation by the notifying Administration...." The Bureau's statement in paragraph 11 of the MO&O that construction permits could be granted prior to receipt of formal concurrence by the Mexican Government is a direct violation of the Bilateral Agreement and ignores the written objection by Mexico.

VI. Conclusion.

For the reasons stated in CCR's Application for Review and in this Reply, CCR respectfully requests that the Commission reverse the Media Bureau's MO&O and approve CCR's proposal.

Respectfully submitted,
CCR-SIERRA VISTA IV, LLC

By: Howard M. Liberman

Howard M. Liberman

Jeewon Kim

DRINKER BIDDLE & REATH LLP

1500 K Street, NW, Suite 1100

Washington, DC 20005

Telephone: 202-842-8800

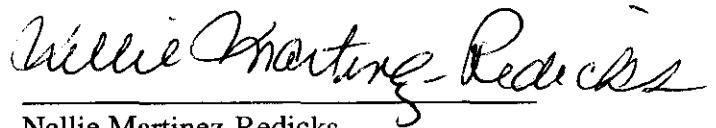
Its Attorneys

May 21, 2008

Certificate of Service

I, Nellie Martinez-Redicks, a secretary at the law firm of Drinker Biddle & Reath LLP, certify that on this 21st day of May 2008 I caused the foregoing *Reply to Opposition to Application for Review* to be served by first-class mail on the following:

Mark N. Lipp, Esq.
Wiley Rein LLP
1776 K Street, NW
Washington, DC 20006
*Counsel for Cochise Broadcasting, LLC and
Desert West Air Ranchers Corporation*



Nellie Martinez-Redicks